

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN
POLICE DEPARTMENT,

Appellant/Cross-Respondent,

vs.

LAS VEGAS REVIEW-JOURNAL,

Respondent/Cross-Appellant,

And

AMERICAN BROADCASTING
COMPANIES, INC.; THE
ASSOCIATED PRESS; CABLE NEWS
NETWORK, INC.; CHESAPEAKE
MEDIA I, LLC, D/B/A KSNT-TV; LOS
ANGELES TIMES
COMMUNICATIONS, LLC; THE NEW
YORK TIMES COMPANY; SCRIPPS
BROADCASTING HOLDINGS, LLC;
WP COMPANY, LLC, D/B/A THE
WASHINGTON POST,

Respondents.

Case No.: 75518

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Appeal from the Eighth Judicial District
Court Case Nos.: A764030; A764169,
The Honorable Stephanie Miley
Presiding.

**APPELLANT/CROSS-
RESPONDENT LVMPD'S
OPENING BRIEF**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. The Las Vegas Metropolitan Police Department ("LVMPD") is a governmental entity and has no corporate affiliation.
2. LVMPD is represented in the District Court and this Court by the law firm of Marquis Aurbach Coffing.

Dated this 26th day of September, 2018.

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TABLE OF CONTENTS

I.	JURISDICTIONAL STATEMENT	1
II.	ROUTING STATEMENT	2
III.	ISSUES ON APPEAL.....	2
A.	WHETHER THE DISTRICT COURT ERRED BY REQUIRING PRODUCTION OF BWC FOOTAGE, RATHER THAN INSPECTION, WHEN NRS 289.830 REQUIRES INSPECTION IF THE BWC FOOTAGE CONTAINS CONFIDENTIAL INFORMATION.	2
B.	WHETHER THE DISTRICT COURT ERRONEOUSLY INTERPRETED NRS 239.055 TO LIMIT LVMPD'S EXTRAORDINARY USE FEE TO 50 CENTS AND EXCLUDE LVMPD'S ABILITY TO CHARGE FOR ELECTRONIC RECORDS WHEN:.....	3
1.	NRS 239.055 PERMITS AN ADDITIONAL REASONABLE FEE LVMPD ACTUALLY INCURS FOR EXTRAORDINARY USE OF PERSONNEL; AND.....	3
2.	NOTHING IN NRS 239.055 EXPLICITLY EXCLUDES OR PROHIBITS ITS APPLICATION TO ELECTRONIC RECORDS.....	3
C.	WHETHER THE DISTRICT COURT ERRED BY PERMITTING RESPONDENTS TO PAY THE PRODUCTION COSTS OVER A SIX-MONTH PERIOD RATHER THAN REQUIRING RESPONDENTS TO PAY THE ESTIMATED FEE UPFRONT.....	3
IV.	STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENTS.....	3
V.	STANDARDS OF REVIEW	7

VI.	RELEVANT FACTUAL AND PROCEDURAL BACKGROUND	8
A.	RESPONDENTS' PUBLIC RECORDS REQUESTS.....	8
B.	THE DISCLOSURE ORDER.	11
C.	PRODUCTION OF THE RECORDS REQUIRES EXTRAORDINARY USE OF PERSONNEL AND TECHNOLOGICAL RESOURCES.	13
1.	The 911 Calls.....	13
2.	The BWC Footage.....	13
D.	THE COST ORDER.....	15
VII.	LEGAL ARGUMENT	17
A.	BACKGROUND OF THE NPRA.	17
B.	THE DISTRICT COURT ERRED IN ORDERING PRODUCTION OF BWC FOOTAGE RATHER THAN INSPECTION IN ACCORDANCE WITH NRS 289.830.....	19
1.	Background and Purpose of Body Worn Camera Law.....	19
2.	NRS 289.830 Mandates Inspection of BWC Footage that Contains Confidential Information.....	22
C.	THE DISTRICT COURT ERRONEOUSLY INTERPRETED NRS 239.055 TO LIMIT LVMPD'S EXTRAORDINARY USE FEE TO 50 CENTS AND EXCLUDE ALL FEES RELATING TO ELECTRONIC RECORDS.....	24
1.	NRS 239.055 Permits an Additional Reasonable Fee that LVMPD Actually Incurs for Extraordinary Use of Personnel and Technological Resources.....	30

2.	Nothing within NRS 239.055 Excludes or Prohibits its Application to Electronic Records.	32
D.	THE DISTRICT COURT ERRED BY PERMITTING RESPONDENTS TO PAY THE PRODUCTION COSTS OVER A SIX-MONTH PERIOD RATHER THAN REQUIRING RESPONDENTS TO PAY THE ESTIMATED FEE UPFRONT.....	35
VIII.	CONCLUSION.....	36

TABLE OF AUTHORITIES

CASES

<i>Ashokan v. State, Dep't of Ins.,</i> 109 Nev. 662, 856 P.2d 244 (1993)	1
<i>Baron v. Dist. Ct.,</i> 95 Nev. 646, 600 P.2d 1192 (1979)	7
<i>Breen v. Caesars Palace,</i> 102 Nev. 79, 715 P.2d 1070 (1986)	31
<i>City of Reno v. Reno Gazette-Journal,</i> 119 Nev. 55, 63 P.3d 1147 (2003)	7
<i>DR Partners v. Board of Cnty. Commr's,</i> 116 Nev. 616, 6 P.3d 465 (2000)	17
<i>Hunt v. Warden,</i> 111 Nev. 1284, 903 P.2d 826 (1995)	7
<i>LVMPD v. Blackjack Bonding,</i> 343 P.3d 608 (Nev. 2015).....	7, 23
<i>Manuela H. v. Eighth Jud. Dist. Ct.,</i> 132 Nev. Adv. Op. 1, 365 P.3d 497 (2016).....	34
<i>Mardian v. Greenberg Family Trust,</i> 131 Nev. Adv. Op. 72, 359 P.3d 109 (2015).....	24
<i>Orion Portfolio Services 2, LLC v. County of Clark, ex rel. Univ. Medical Cntr.</i> <i>of S. Nev.,</i> 126 Nev. 397, 245 P.3d 527 (2010).....	24
<i>Peck v. Crouser,</i> 129 Nev. 120, 295 P.23d 586 (2013)	2

<i>PERS v. Reno Newspapers Inc.</i> , 129 Nev. 833, 313 P.3d 221 (2013)	23
<i>Piroozi v. Eighth Jud. Dist. Court</i> , 131 Nev. 1004, 363 P.3d 1168 (2015)	22
<i>Reno Newspapers, Inc. v. Gibbons</i> , 127 Nev. 873, 266 P.3d 623 (2011)	17
<i>State Indus. Ins. System v. Bokelman</i> , 113 Nev. 1116, 946 P.2d 179 (1997)	31
<i>Williams v. State, Dep't of Corr.</i> , 133 Nev. ____, ____, 402 P.3d 1260 (2017)	22

OTHER AUTHORITIES

Assembly Bill 31	27, 28
Assembly Bill 162	19
Hearing on AB 162 Before the Assembly Committee on Government Affairs, 78 Leg. (Nev. Mar. 9, 2015).....	4, 19, 20
Hearing on SB 111 Before the Assembly Committee on Ways and Means, 78 Leg. (Nev. June 1, 2015)	21
Hearing on SB 111 Before the Senate Committee on Government Affairs, 78 Leg. (Nev. Mar. 11, 2015).....	21
Hearing on SB 111 Before the Senate Committee on Government Affairs, 78 Leg. (Nev. May 8, 2015)	21
Senate Bill 74	28
Senate Bill 111	21
Senate Bill 123	26

RULES

NRAP 3A(b)(1)	1
NRAP 3A(b)(8)	2
NRAP 17(a)(10)	2
NRAP 17(a)(11)	2

STATUTES

NRS 239.001(3).....	17
NRS 239.005(1).....	18
NRS 239.010	19
NRS 239.010(1).....	4, 16, 18, 22
NRS 239.010(3).....	22, 25
NRS 239.0107	17, 35
NRS 239.011	8, 10
NRS 239.011(1).....	17
NRS 239.011(2).....	17
NRS 239.0113	17
NRS 239.052	5, 18, 23, 24, 30, 32, 33
NRS 239.052(1).....	18
NRS 239.055	3, 4, 6, 13, 16, 18, 23, 25, 28, 29, 30, 31, 32, 33, 36

NRS 239.055(1).....	5, 23, 24, 34
NRS 239.055(2).....	33
NRS 289.830	2, 3, 4, 19, 21, 35
NRS Chapter 239 (NPRA)	1, 2, 4, 5, 6, 12, 16, 17, 18, 19, 20, 22, 27, 32

I. JURISDICTIONAL STATEMENT

LVMPD appeals from the District Court's order granting the petitions for writ of mandamus filed by Respondents American Broadcasting Companies, Inc. ("ABC"), the Associated Press ("AP"), Cable News Network, Inc. ("CNN"), Chesapeake Media I, LLC, d/b/a KSNV-TV ("KSNV"), Los Angeles Times Communications, LLC ("LA Times"), The New York Times Company ("NYT"), WP Company LLC d/b/a The Washington Post's ("Washington Post") (collectively the "Media") and the Las Vegas Review-Journal ("LVRJ" and collectively with the Media "Respondents"). 7 Appellant/Cross-Respondent's Appendix ("AA") 1313-1322. The District Court's order granting Respondents' petitions for writ of mandamus (hereinafter the "Disclosure Order") is a final, appealable order according to NRAP 3A(b)(1), which allows for an appeal from a final order or judgment. *See Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 665–666, 856 P.2d 244, 246 (1993). LVMPD also appeals from the District Court's special post-judgment order concerning the fees LVMPD may charge in relation to producing the records ordered to be disclosed. 7 AA 1323-1331. Initially, the Disclosure Order provided that the Respondents "shall pay the fees associated with the production of public records in accordance with NRS Chapter 239." 7 AA 1321. The District Court's post-judgment order, however, limited the fees LVMPD may charge (hereinafter the "Cost Order"), inconsistent with the

Disclosure Order and NRS Chapter 239, resulting in a special, post-judgment order affecting LVMPD's rights. NRAP 3A(b)(8); *see also Peck v. Crouser*, 129 Nev. 120, 123, 295 P.23d 586, 587 (2013).

LVMPD's Notice of Appeal was timely filed on March 30, 2018 from the District Court's order, which was noticed on March 2, 2018. 7 AA 1313-1322; 1332-1334. Therefore, this Court has appellate jurisdiction over this appeal.

II. ROUTING STATEMENT

This appeal asks the Court to resolve several issues of first impression that are also of statewide public importance, including: (1) the inspection of Body Worn Camera ("BWC") footage containing confidential information pursuant to NRS 289.830; (2) a governmental entity's ability to charge a fee for reviewing and redacting confidential portions of otherwise public records; and (3) payment made in advance when extraordinary use for producing public records is required. Based upon NRAP 17(a)(10) and (11), the Supreme Court should retain this appeal since it involves issues of first impression that are also of statewide public importance.

III. ISSUES ON APPEAL

- A. WHETHER THE DISTRICT COURT ERRED BY REQUIRING PRODUCTION OF BWC FOOTAGE, RATHER THAN INSPECTION, WHEN NRS 289.830 REQUIRES INSPECTION IF THE BWC FOOTAGE CONTAINS CONFIDENTIAL INFORMATION.**

B. WHETHER THE DISTRICT COURT ERRONEOUSLY INTERPRETED NRS 239.055 TO LIMIT LVMPD'S EXTRAORDINARY USE FEE TO 50 CENTS AND EXCLUDE LVMPD'S ABILITY TO CHARGE FOR ELECTRONIC RECORDS WHEN:

- 1. NRS 239.055 PERMITS AN ADDITIONAL REASONABLE FEE LVMPD ACTUALLY INCURS FOR EXTRAORDINARY USE OF PERSONNEL; AND**
- 2. NOTHING IN NRS 239.055 EXPLICITLY EXCLUDES OR PROHIBITS ITS APPLICATION TO ELECTRONIC RECORDS**

C. WHETHER THE DISTRICT COURT ERRED BY PERMITTING RESPONDENTS TO PAY THE PRODUCTION COSTS OVER A SIX-MONTH PERIOD RATHER THAN REQUIRING RESPONDENTS TO PAY THE ESTIMATED FEE UPFRONT.

IV. STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENTS

The District Court improperly ordered LVMPD to produce approximately 748 hours of BWC footage related to the 1 October shooting. In reaching this order, the District Court ignored: (1) the time and cost LVMPD would necessarily incur to redact confidential information contained within the footage; and (2) the plain language of NRS 289.830 requiring inspection of the footage because it contained confidential information. The District Court also erred by limiting the fees LVMPD may charge for reviewing and redacting confidential information to .50 cents for records containing pages and prohibiting LVMPD from charging any fee for reviewing and redacting electronic records, including BWC footage and

911 calls. Finally, the District Court erroneously ordered Respondents to pay LVMPD's fee in six monthly installments instead of providing the estimated payment, or alternatively, a substantial deposit, upfront.

In this appeal, LVMPD asks the Court to determine that BWC footage containing confidential information must be inspected pursuant to NRS 289.830. Alternatively, if this Court finds production is nonetheless appropriate, LVMPD asks this Court to conclude that LVMPD may charge a reasonable rate for redacting the substantial amount of confidential information contained in the BWC footage, as well as 911 calls. Likewise, LVMPD requests that this Court determine that the additional fee for extraordinary use pursuant to NRS 239.055 is not limited to .50 cents and that any payment required by the NPRA must be paid in advance of production. LVMPD's requested relief is based upon the following arguments:

A. The Legislature recognized NRS 289.830 as an exception to the NPRA. *See* NRS 239.010(1). In reviewing the purpose and policy of the BWC statute, it is clear that the purpose was to promote transparency and assist with the relationship between the public and law enforcement. Hearing on AB 162 Before the Assembly Committee on Government Affairs, 78 Leg. (Nev. Mar. 9, 2015). The Legislature, however, also acknowledged the need to balance victim privacy and carved out an exception when BWC footage contained confidential information. Specifically, Mr. Callaway on behalf of LVMPD, testified at the legislative hearing

that inspection was necessary to avoid re-victimization of witnesses and the undue burden placed on the Department in redacting BWC footage on a frame by frame level. *Id.* Thus, this Court should conclude BWC footage containing confidential information is subject to inspection, not production.

B. The NPRA explicitly permits LVMPD to charge the actual cost of providing copies of public records. NRS 239.052. LVMPD is also able to charge an additional fee for the extraordinary use of personnel or technological resources. NRS 239.055(1). The provisions of this statute, however, inherently conflict with one another. The fee for extraordinary use must be reasonable and actually incurred by LVMPD. *Id.* The statute also includes a .50-cent per page limitation. *Id.* LVMPD interprets, and the legislative history supports, the .50-cent per page limitation strictly applies to copy charges permitted under NRS 239.052. In other words, when extraordinary use is necessary, LVMPD's copy charge cannot exceed .50 cents per page, and the fee for extraordinary use of personnel and technological resources must be reasonable and actually incurred. This fee is based on the qualified employee's rate and the time it takes to perform the task.

More importantly, the extraordinary use provision is in no way limited to records with pages, but applies to all public records, including BWC footage and

911 calls.¹ Any other interpretation would be unreasonable and would conflict with the NPRA. To reach this erroneous interpretation, the District Court relied on the “per page” language found within NRS 239.055. This language, as illustrated by the legislative history, strictly applies to the copying of public records. The District Court ignored the “reasonable” and “actually incurred” language, which undoubtedly applies to BWC footage and 911 calls. Finally, the extraordinary use provision applies to technological resources. Technological resources are necessary to complete the review, redaction, and production of BWC footage and 911 calls. Therefore, this Court should determine that LVMPD may charge a reasonable fee that it actually incurs for reviewing, redacting, and producing public records that necessitate extraordinary use, including BWC footage and 911 calls.

C. Last, the purpose and policy of the extraordinary use statute supports advance payment of fees related to the same. Prior to beginning production on records requests that would require extraordinary use, LVMPD must inform the requester of the estimated fee. Although the NPRA is silent on when payment of

¹ To be clear, LVMPD requests that this Court interpret extraordinary use of personnel and /or technological resources provision to include BWC footage specific to this case because the District Court ordered production of the same. However, it is LVMPD’s position that BWC footage that contains confidential information is not subject to production, but rather inspection. In that instance, presumably, LVMPD would not be faced with extraordinary use of personnel or technological resources, and thus, LVMPD would not charge an additional fee.

the fee for extraordinary use is due, it is reasonable to conclude that the fee must be paid prior to production. Without payment in advance, the requester can refuse to collect the records. This puts LVMPD in a predicament. On one hand, LVMPD moves forward with production and risks not receiving payment. In this instance, LVMPD is without a remedy to recover the cost it incurred for preparing records for production. On the other hand, LVMPD can refuse to produce records until it receives payment. As LVMPD has experienced, however, such a refusal is considered a denial of access to public records, and forcing LVMPD into litigation. Thus, this Court should require the requester to submit advance payment of the estimated fee when production involves extraordinary use.

V. STANDARDS OF REVIEW

This Court reviews a district court's decision to grant or deny a petition for a writ of mandamus under an abuse of discretion standard. *See City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003). Questions of statutory construction, however, including the meaning and scope of a statute, are questions of law, which this Court reviews de novo. *Id.* This Court also reviews the District Court's interpretation of case law de novo. *See LVMPD v. Blackjack Bonding*, 343 P.3d 608, 612 (Nev. 2015).

When the Legislature has addressed a matter with "imperfect clarity," it becomes the responsibility of this Court to discern the law. *See Baron v. Dist. Ct.*,

95 Nev. 646, 648, 600 P.2d 1192, 1193–1194 (1979). Given an ambiguous statute, this Court must interpret the statute “in light of the policy and the spirit of the law, and the interpretation should avoid absurd results.” *Hunt v. Warden*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995).

VI. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. RESPONDENTS’ PUBLIC RECORDS REQUESTS.

The Media filed their respective Amended Public Records Act Application Pursuant to Nev. Rev. Stat. § 239.011/Petition for Writ of Mandamus (“Media’s Amended Petition”) on November 28, 2017.² 1 AA 56-87. Within the Coalitions’ Amended Petition, the following records were sought:

<u>Media Agency</u>	<u>Date</u>	<u>Request</u>
ABC	10/2/2017	“All body cam, dash cam, CCTV video (publicly and privately owned), as well as any other types of recording connected with the active shooter/mass casualty event on Oct. 1, 2017. Also . . . all police radio traffic and all police reports connected with the incident.” ³
ABC	10/11/2017	“All 911 audio connected with Oct. 1 shooting incident at Mandalay Bay.” ⁴

² The Media filed the initial Petition on November 2, 2017; however, the same content of the initial Petition is included in the Media’s Amended Petition.

³ See 1 AA 66-68.

⁴ See 1 AA 69-70.

CNN	10/3/2017	"[A]ll copies of records pertaining to Stephen Paddock . . . specifically including but not limited to 911 dispatch calls, evidence logs, hotel surveillance video, police body cam footage, interview reports, and anything related to this investigation." ⁵
LA Times	10/10/2017	"the 911 recordings related to the shooting . . ." ⁶
AP	10/12/2017	"[A]ny and all 911 emergency calls dispatch recordings relating to the shooting . . ." ⁷
AP	10/24/2017	Form request for Body Worn Camera ("BWC") ⁸
NYT	10/16/2017	"[C]opies of public records that include information about emergency response to the mass shooting . . . [t]his includes all records of phone calls to police, recordings of dispatch and body camera footage." ⁹
KTNV	11/13/2017	Access to all copies of records pertaining to Stephen Paddock, the suspect in the Las Vegas Shooting, specifically including but not limited to 911 dispatch calls, evidence logs, hotel surveillance video, police body cam footage, interview reports, and anything related to this shooting investigation. All applications for search warrants related to the shooting. ¹⁰

⁵ See 1 AA 71-73.

⁶ See 1 AA 74-75.

⁷ See 1 AA 76-78.

⁸ See 1 AA 79-81.

⁹ See 1 AA 82-83.

¹⁰ See 1 AA 84-87.

The Media requested that the Court enter an order requiring LVMPD to make available complete copies of all records. 1 AA 65. The LVRJ submitted a similar Amended Public Records Act Application Pursuant to Nev. Rev. Stat. § 239.011/Petition for Writ of Mandamus on December 6, 2017¹¹ seeking the following documents:

<u>Media</u> <u>Agency</u>	<u>Date</u>	<u>Request</u>
LVRJ	10/2/2017	Log and call slips of any and all emergency calls made on October 1, 2017 between 8:00 p.m. and 2:00 a.m. on October 2, 2017, including unit logs for police and fire and ambulance dispatch. ¹²
LVRJ	10/15/2017	Purchase orders for emergency purchases on or after Oct. 1, 2017 and emergency no-bid contracts on or after Oct. 1, 2017. ¹³
LVRJ	11/30/2017	Copies of any and all documents that reflect any weapons obtained through the course of the . . . investigation that are suspected to have belonged to mass shooter Stephen Paddock. ¹⁴

¹¹ LVRJ filed its initial Petition on November 3, 2017, creating a separate lawsuit. However, the District Court consolidated the cases at LVRJ's request. The content of the initial Petition is also included in the LVRJ's Amended Petition. *See* 1 AA 204-214.

¹² *See* 1 AA 100-104.

¹³ *See* 1 AA 115-118.

¹⁴ *See* 1 AA 119-124.

Like the Media, LVRJ requested the Court enter an order requiring LVMPD to make available complete copies of all records. 1 AA 99. Although LVRJ never requested the body worn camera, it later joined in the Media's request. *Id.*

LVMPD argued that most of the records sought should remain confidential due to the ongoing investigation by LVMPD. 1 AA 178-198. Additionally, LVMPD argued that disclosing BWC footage would implicate the privacy interests of the individuals displayed on the video, including those injured and receiving medical treatment and deceased. *Id.* And, because of this confidential information, the BWC footage should be inspected, rather than produced, in accordance with NRS 289.830. *Id.*

B. THE DISCLOSURE ORDER.

On February 7, 2018 the Court entertained oral arguments on the briefing submitted regarding Petitioners' Amended Petitions requesting various documents from LVMPD related to the 1 October shooting. 5 AA 866-925. Given the extraordinary circumstances surrounding the 1 October shooting and the massive quantities of documents sought by Respondents, the District Court found there was no implied or express or statutory waiver due to LVMPD's pre-petition conduct. 5 AA 905.

Despite Respondents' overly broad and vague public records requests, the District Court granted the Amended Petitions. *Id.* The District Court determined

that LVMPD failed to meet its burden in demonstrating that the impact on the current investigation outweighs the public's interest in disclosure. 7 AA 1318-1319. Summarily, the District Court ordered the disclosure of: 911 calls; body worn camera footage; dash cam footage; CCTV video; evidence logs; dispatch information; interview reports; search warrant returns; affidavits of probable cause; purchase orders and no-bid contracts; and any information on any weapons obtained during the investigation into the 1 October Massacre. *Id.* at 1320. As a result of the District Court's Order requiring disclosure of all the requested public records, it did not require LVMPD to produce a privilege log as Respondents' requested. *Id.* at 1319.

With respect to LVMPD's personal privacy arguments, the Court determined that any personal privacy concerns implicated by the public records disclosure could be remedied by redactions. 7 AA 1319. To that end, the Court ordered names (other than government officials), addresses, phone numbers, social security numbers, descriptions of individuals, and social media data for all individuals to be redacted. *Id.* This included redactions of the individuals appearing in footage from body worn cameras. 5 AA 912.

In addition to requiring LVMPD to disclose all the requested records, the District Court ruled that it was not waiving the payment obligations of the NPRA and ordered Respondents to pay the costs associated with the production. 7 AA

1321. To determine the costs LVMPD was entitled to charge, the District Court requested additional briefing. *Id.* at 1322.

C. PRODUCTION OF THE RECORDS REQUIRES EXTRAORDINARY USE OF PERSONNEL AND TECHNOLOGICAL RESOURCES.

In its supplemental briefing, LVMPD indicated that production of the records would require the extraordinary use of personnel and technological resources; thus, it was entitled to charge an additional fee for such production pursuant to NRS 239.055. 6 AA 1013-1029. Redactions related to the 911 calls and BWC footage proved to be the most time consuming and costly.

1. The 911 Calls.

Prior to actually reviewing all 911 calls, LVMPD estimated it received upwards of 1,600 calls in the first 24 hours regarding the 1 October shooting. 6 AA 1021. Given the Court's ruling, LVMPD was required to redact all personal identifying information from these phone calls. *Id.* At the time of the District Court's order, LVMPD only had three research analysts who were qualified and trained to perform redactions of 911 calls. *Id.* Moreover, LVMPD had only maintained a single software license for redacting 911 calls. *Id.*

2. The BWC Footage.

Lt. Corey Moon originally indicated that there was approximately 748 hours of BWC footage related to the 1 October shooting. 7 AA 1306-1309. The

redaction process for BWC footage is quite time consuming as it requires: (1) an initial review of the footage to determine what content needs to be redacted; (2) redacting the information, both video and audio, at frame level editing; and (3) quality control review by an uninvolved operator to ensure redaction is completed. *Id.* There were only two officers that were specifically trained and assigned to redact BWC footage at the time of the Disclosure Order. *Id.* Both of the officers worked with special, high performance computers and dedicated redaction software used to redact videos. *Id.* The following chart is what LVMPD originally estimated for the time and cost associated with producing the BWC footage:

	<u>Hours of Video</u>	<u>Rate</u>	<u>Time Spent</u>	<u>Total Cost</u>
Initial Review	748	1.25 hours	935 hours	\$46,750
Redaction Process	748	4 hours	2992 hours	\$149,600 (low)
	748	10 hours	7480 hours	\$347,000 (high)
Quality Control	748	1 hour	748 hours	\$37,400

Id. Lt. Moon guessed that if the project was properly staffed, it could take anywhere from six months or longer to complete. *Id.*

To shed some light on these figures, it is important to know that it took LVMPD—specifically two squads of people from the Critical Incident Review

Team (CIRT)—60 days to review all this footage just for investigatory purposes. *Id.* Given the amount of video hours, and an entirely different purpose, LVMPD contended it would take *at least* 23 weeks for one employee to complete the initial review process, which would require the employee to review this graphic footage on a continuing basis. *Id.* Understandably, LVMPD owes a duty to its employees to be mindful of their mental health. 6 AA 1022. This material is extremely graphic, and it is against LVMPD policy to assign a single person to review this material. *Id.* With that in mind, LVMPD can only require the trained employees to review the materials a few hours per day due to potential issues involved with reviewing the graphic material. *Id.*

D. THE COST ORDER.

On February 14, 2018, the Parties submitted their respective supplemental briefs on the cost issue. 5 AA 926-1012; 6 AA 1013-1309. It was always LVMPD's position that the requested records were overly broad and burdensome to produce, requiring extraordinary use of personnel and technological resources to comply with the Disclosure Order. 6 AA 1013-1309. Indeed, LVMPD was forced to re-direct detectives and supervisors from their daily duties to implement a team for production purposes so it can timely disclose records, on a rolling basis, in accordance with the District Court's Orders.

On March 9, 2018, the District Court issued its ruling on the cost issue. 7 AA 1323-1331. The District Court ruled LVMPD may charge copying and staff fees, not to exceed .81 cents per page in the production of the evidence log and interview reports. *Id.* at 1327-1328. In reaching this conclusion, the District Court determined that the “actual cost” language within the statute is unreasonably expansive and would render the .50-cent limitation nugatory. *Id.* at 1326. This fee was based on LVMPD’s .31-cent copy charge and the .50-cent fee for extraordinary use pursuant to the District Court’s ruling. LVMPD was also permitted to charge for pre-preparation costs associated with the production of dispatch logs pursuant to NRS 239.054. *Id.* at 1329. On the other hand, production of body worn camera footage and 911 calls was limited to the cost to reproduce the records onto the medium and the actual cost of such medium. *Id.* The court incorrectly concluded that the extraordinary use provision within NRS 239.055 is only limited to records that contain pages and not applicable to electronic records such as video footage and 911 calls. *Id.* at 1327. The District Court also reiterated its previous Order and required LVMPD to produce records on a rolling basis. *Id.* at 1330.

LVMPD timely filed its notice of appeal of the Disclosure Order and Cost Order on March 31, 2018. 7 AA 1332-1352. LVRJ gave notice it intended to cross-appeal the Cost Order on April 13, 2018. 7 AA 1353-1355.

VII. LEGAL ARGUMENT

A. BACKGROUND OF THE NPRA.

The NPRA provides that all public books and public records of governmental entities must remain open to the public, unless “otherwise declared by law to be confidential.” NRS 239.010(1). The Legislature has declared that the purpose of the NPRA is to further the democratic ideal of an accountable government by ensuring that public records are broadly accessible. NRS 239.001(1). Any limitations or restrictions on the public’s right of access must be narrowly construed. NRS 239.001(3).

Generally, the person who has legal custody or control of the requested public record has five business days to respond to a request for public records. NRS 239.0107. Upon denial of access to public records, the requester may seek judicial relief for an order permitting inspection or requiring production of the public record. NRS 239.011(1). Notably, courts are required to give NPRA actions priority over other civil matters. NRS 239.011(2). If a governmental entity withholds records, it bears the burden of proving, by a preponderance of the evidence, that the records are confidential. NRS 239.0113. *See Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 877–878, 266 P.3d 623, 626 (2011). The balancing-of-competing-interests test is employed when the requested record is not explicitly made confidential by law and the governmental entity nonetheless resists

disclosure of the information. *Id.* at 878-879, 266 P.3d at 627. This test weighs “the fundamental right of a citizen to have access to the public records” against “the incidental right of the agency to be free from unreasonable interference.” *DR Partners v. Board of Cnty. Commr’s*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). To meet its burden under the balancing test, the government entity cannot rely on hypothetical concerns and must make a particularized showing. *Gibbons*, 127 Nev. at 881, 266 P.3d at 628.

The Legislature also recognized the inevitable cost associated with producing records and permitted the government entity to charge a fee for providing a copy of the public record. NRS 239.052(1). Generally, the fee charged must reflect the amount the government entity actually incurs directly related to the production of records. NRS 239.005(1). An exception to the general rule applies when the extraordinary use of personnel or technological resources is necessary to provide the public record. NRS 239.055. The NPRA allows a government entity to charge a reasonable fee that it actually incurs for the extraordinary use of its personnel or technological resources. *Id.* The copy charge permitted under NRS 239.052, however, cannot exceed .50 cents per page in such circumstances. *Id.*

Most importantly, the NPRA does not define “public record.” With no definition, supporters proposed an amendment to NRS 239.010(1) during the 2013

Legislative session. 5 AA 1169-1178. Due to the confusion between the public and governmental agencies concerning what is subject to the NPRA, the Legislature codified a list of statutory exceptions. See NRS 239.010(1). Importantly, the list of statutes would not be exhaustive and the statute would maintain a catch-all phrase “and otherwise declared by law to be confidential” to ensure there were no unintended consequences for failing to include all statutes. 6 AA 1169-1178. Thus, the lists of statutes now enumerated within NRS 239.010 serve as exceptions from the NPRA.

B. THE DISTRICT COURT ERRED IN ORDERING PRODUCTION OF BWC FOOTAGE RATHER THAN INSPECTION IN ACCORDANCE WITH NRS 289.830.

1. Background and Purpose of Body Worn Camera Law.

In 2015, Assembly Bill 162 (“AB 162”) proposed that law enforcement agencies may require its on-duty officers to wear “portable event recording devices,” also known as BWC. Hearing on AB 162 Before the Assembly Committee on Government Affairs, 78 Leg. (Nev. Mar. 9, 2015). The general purpose of this bill was to promote transparency and assist with the relationship between the public and law enforcement given the events occurring around the country at the time, such as the death of Michael Brown in Ferguson, Missouri. *Id.*

Mr. Chuck Callaway, the Director of Office of Intergovernmental Services of LVMPD, gave testimony in support of AB 162 and described it as “win-win.”

Id. While that majority of questions directed at Mr. Callaway concerned the expense associated with the devices, Mr. Callaway discussed in detail the effects public records laws have on similar BWC statutes. *Id.* Mr. Callaway referenced an article in *The Seattle Times* titled “Costly Public-Records Requests May Threaten SPD (Seattle Police Department) Plan for Body Cameras.” *Id.* In discussing the article, Mr. Callaway explained the need for criteria within the law for requesting body camera footage. *Id.* For example, requests should be made for a specific incident rather than blanket requests for videos from one date to another date. *Id.*

Mr. Callaway further clarified the need for inspection when footage contained confidential or sensitive information. *Id.* The examples given at the hearing included information related to juveniles and victims of sexual assault. *Id.* In instances involving confidential or sensitive information, the victim, attorney, or media, would be given the opportunity to inspect the video, comporting with the NPRA. *Id.* The reason for inspection is two-fold. First, redaction of information requires frame by frame audio and visual redaction. *Id.* Even in a three-minute video, it would take a significant amount of time to review the video and redact an individual’s face from each particular frame of the video. *Id.* Second, inspection would prohibit re-victimization of the victims. *Id.* By way of example, Mr. Callaway explained that if an officer arrived to a scene while a crime was in

progress, such as a woman being sexually assaulted in a park, that video should not be released but made for inspection. *Id.* Mr. Callaway echoed these same sentiments on March 11, 2015 before the Senate Committee regarding Senate Bill 111 (“SB 111”).¹⁵ Hearing on SB 111 Before the Senate Committee on Government Affairs, 78 Leg. (Nev. Mar. 11, 2015).

While the statute provides inspection when BWC footage “may not otherwise be redacted,” this language is ambiguous because there is no dispute that BWC footage can be redacted, as evidenced by this case. Furthermore, Mr. Calloway’s testimony demonstrates that redaction is possible. However, the issue is the complexity of the redaction. Thus, the Legislature must have intended there be a distinction between when redaction is simple and possible versus when redactions are complex and burdensome. It is further unclear what “otherwise” within the statute means. As this case demonstrates, when redaction of BWC requires over 9,000 hours to perform, redaction is not practicable and inspection of the BWC footage is more appropriate.

¹⁵ SB 111 was initially similar to AB 162, but ultimately only applied to Nevada Highway Patrol. Hearing on SB 111 Before the Senate Committee on Government Affairs, 78 Leg. (Nev. May 8, 2015); Hearing on SB 111 Before the Assembly Committee on Ways and Means, 78 Leg. (Nev. June 1, 2015).

2. NRS 289.830 Mandates Inspection of BWC Footage that Contains Confidential Information.

The District Court erred by requiring LVMPD to undertake an onerous burden and expense of reviewing and redacting 748 hours of BWC footage frame by frame, rather than require the Respondents to inspect the footage in accordance with the purpose and policy of NRS 289.830. As a result of the substantial confidential and sensitive information contained within the 1 October BWC footage, LVMPD estimated it could take over 9,000 hours to review, redact, and perform quality control on the videos to comply with the District Court's ordered redactions, costing over half-a-million dollars.¹⁶ The purpose of the inspection mandate within NRS 289.830, in part, is to prevent this exact burden and cost on LVMPD. Five months after its first BWC production, LVMPD's team of detectives continue to review and redact BWC videos for production.

Importantly, LVMPD does not dispute that BWC footage is a public record. To that end, the inspection provision also complies with the NPRA, which permits inspection of public records. LVMPD does recognize that the NPRA requires it to redact confidential information included within a public record. NRS 239.010(3).

¹⁶ Importantly, LVMPD agreed to provide the footage for a flat fee of \$50, rather than the rate of the employee performing the task. Thus, the cost included in Lt. Moon's declaration is based on the \$50 fee and not the cost actually incurred by LVMPD.

Notably, however, NRS 289.830 is enumerated within NRS 239.010 as an exception to the NPRA. *See* NRS 239.010(1). The statute governing BWCs is an exception and supersedes NRS 239.010(3) to the extent that it provides a mechanism for access to videos that contain confidential information. *See Williams v. State, Dep't of Corr.*, 133 Nev. ____, ____, 402 P.3d 1260, 1265 (2017) (internal citations and quotation marks omitted) (finding that the more specific statute will take precedence and is construed as an exception to the more general statute, so that, when read together, the two provisions are not in conflict, but can exist in harmony); *see also Piroozi v. Eighth Jud. Dist. Court*, 131 Nev. 1004, 1009, 363 P.3d 1168, 1172 (2015) (providing that “[w]here a general and a special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute controls”) (internal quotation marks omitted).

Thus, in instances, such as the 1 October BWC footage, where confidential and sensitive information is contained in BWC footage, the videos are subject to inspection and not production. Therefore, the District Court erred in requiring production, rather than inspection of the BWC footage.

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C. THE DISTRICT COURT ERRONEOUSLY INTERPRETED NRS 239.055 TO LIMIT LVMPD'S EXTRAORDINARY USE FEE TO 50 CENTS AND EXCLUDE ALL FEES RELATING TO ELECTRONIC RECORDS.

While the District Court correctly found that the production of the requested public records would require extraordinary efforts from LVMPD, it erroneously limited LVMPD's extraordinary use of personnel fees and technological resources to .50 cents. The District Court further erred in determining that electronic records did not fall within the purview of NRS 239.055.

In prior case law, this Court has recognized the difference between the extraordinary use of personnel and the maximum copy charge of .50 cents. For example, in *LVMPD v. Blackjack Bonding*, 343 P.3d 608, 615 (Nev. 2015), this Court did not disturb the District Court's order requiring the requester to "bear the costs of production." Similarly, in *PERS v. Reno Newspapers Inc.*, 129 Nev. 833, 840, 313 P.3d 221, 225 (2013), this Court commented that NRS 239.055 "permit[s] a government entity to charge an additional fee for extraordinary resources necessary to comply with 'a request for a copy of a public record.'" (emphasis omitted). The Court should now clarify that the fees for copying public records are distinct from the fees charged for the extraordinary use of personnel.

NRS 239.052 allows a governmental entity to charge a fee for copying public records. In contrast, NRS 239.055(1) allows an additional fee to be charged

when “extraordinary use . . . is required by the public entity.” When extraordinary use of personnel or technological resources is necessary, the entity’s copy charge, permitted by NRS 239.052, cannot exceed .50 cents per page. NRS 239.055(1). However, the NPRA permits an entity to charge an additional fee, aside from the copy charge, for such extraordinary use. *Id.* The extraordinary use fee the entity may charge must be reasonable and a cost that the entity actually incurs. *Id.*

This Court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized. *Mardian v. Greenberg Family Trust*, 131 Nev. Adv. Op. 72, 359 P.3d 109, 111 (2015) (citation and quotation omitted). Conflicts within the statutory language itself are resolved by a resort to legislative history. *See Orion Portfolio Services 2, LLC v. County of Clark, ex rel. Univ. Medical Cntr. of S. Nev.*, 126 Nev. 397, 402, 245 P.3d 527, 531 (2010). Here, the language within NRS 239.055 inherently conflicts with itself. On one hand, an entity’s additional fee for extraordinary use must be reasonable and actually incurred. Yet, on the other hand, the entity cannot charge more than .50 cents per page, which is at odds with the “reasonable” and “actually incurred” language above. Thus, it is appropriate for this Court to resort to the legislative history to determine the Legislature’s intent in relation to this statute.

Notably, the phrase in NRS 239.055 “preparing the requested information” suggests a broader activity than just copying documents. As outlined in NRS 239.010(3), where possible, governmental entities must “redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential.” The legislative history for the NPRA supports LVMPD’s position that requesters, such as Respondents, cannot employ—without payment—governmental entities for public records requests, involving hundreds of pages with confidential information that require redaction.

On August 27, 2002, the Nevada Attorney General issued an opinion regarding Washoe County’s questions about the fees to be charged in copying public records, specifically with extraordinary staff time. 6 AA 1126-1139. Relying on the legislative history, the Attorney General determined the authority granted to a governmental agency to recover actual costs for the “extraordinary use” of personnel in retrieving and copying public records may have, at least in part, been intended to make the agency whole in responding to nuisance inquiries or any inquiry that takes up an unusual amount of staff time. *Id.* at 1138. In defining extraordinary use, the Attorney General found that public records requests should generally take no more than 30 minutes to respond and anything over the 30 minute mark was extraordinary. *Id.* Finally, the opinion explains that the

extraordinary use of personnel should be based on the actual hourly wage of the lowest compensated individual reasonably available and qualified to respond to the public records request. *Id.* at 1139.

In 2007, Senate Bill 123 (“SB 123”) was proposed to add several amendments to the NPRA, including the intent to foster democratic principles and the timeframe in responding to requests. 6 AA 1140-1142. While SB 123 did not specifically address the fee provisions, Dan Musgrove (“Musgrove”), representing University Medical Center of Southern Nevada, shared his concern of low fees and payment for personnel time in responding to requests:

DAN MUSGROVE (University Medical Center of Southern Nevada):
A letter was sent to us from the Las Vegas Review-Journal (Exhibit K) asking for documents. University Medical Center has been under the lights lately due to issues taking place in southern Nevada, and the press has been active in asking for documents. While we tried to respond to the voluminous request in Exhibit K, this information is not easily produced in the manner they asked. Even though the request was in writing and specific, ***it takes staff time and resources, a week to ten days, to determine how to bring the information together and produce it in a manner the newspaper would like to see.*** We are willing to do so, but ***it displaces job functions at the hospital*** that need to take place. We responded to the Las Vegas Review-Journal with a letter seeking payment for staff time to produce this information. Senator Care felt taxpayers pay our salaries and we should set aside normal duties to produce the documents. That is not in the best interest of our hospital to set aside important duties such as financial collections and invoices to work on public requests. How quickly we turn the request around and at what cost to the hospital staff resources becomes a logistical matter. We would like to work with the subcommittee on addressing those matters.

SENATOR CARE: If an office gets a request for documents and there is time for staff to retrieve and copy the documents, it would not be the most important function the office serves, but those people would work for taxpayers at that time by satisfying a taxpayer's request for public records. Overhead costs would have to be eaten as a matter of public policy. *Whatever happened with the request for a check for staff time?*

MR. MUSGROVE: *I have not seen an answer to that. We were looking at staff time of at least two weeks to garner this information. That is a lot of time to take away from normal duties.*

6 AA 1143-1168 (emphases added). As the dialogue demonstrates, the concept of paying staff time for governmental entities in extraordinary circumstances was not foreclosed.

In 2013, Assembly Bill 31 ("AB 31") was introduced to amend the NPRA to include a record official for government agencies, require regulations regarding forms to be used with public records requests, and identify the existing statutory exceptions to the NPRA. The legislative history for AB 31 reflects the discussions regarding the meaning of "actual costs":

Senator Goicoechea: I am concerned because it says actual cost can only be the direct cost of the reproduction and not include the research involved in finding a document. I realize this only pertains to State government and not local government; however, I am concerned about where this will go. There is inherent cost with searching records.

Mr. Munro: That is not part of the bill. We have left the actual cost to your staff to determine; *however, many agencies add personnel costs.*

6 AA 1171-1178 (emphasis added).

In addition to AB 31, Senate Bill 74 (“SB 74”) was also introduced during the 77th Legislature regarding amendments to certain provisions of the NPRA. The main concern regarding this amendment was the inconsistency across the agencies for the fees charged for copying records. In support of the amendment, Barry Smith (“Smith”), Executive Director, Nevada Press Association, testified that many agencies charge \$1.00 per page to supply a stream of revenue for the agencies. 6 AA 1179-1218. While Smith agreed that “[i]t was not the intent of the public records law to charge a person that is the responsibility of the agency in the first place,” he, nonetheless, acknowledged that there is a provision that allows agencies to be compensated for extraordinary use of personnel. *Id.* at 1194.

On April 10, 2013, another hearing was held before the Senate Committee on Government Affairs. 6 AA 1219-1243. At this hearing, the Committee passed SB 74 with an amendment to reflect an adjustment for the copy rate of .50 cents per page, rather than the initial proposed .10 cents per page. *Id.* Once SB 74 passed the Senate Committee, it moved to the Assembly Committee on Government Affairs to be heard on May 3, 2013. 7 AA 1244-1277. Interestingly, the entire May 3 hearing for SB 74 stands for the proposition that the additional language of .50 cents per page, now codified in NRS 239.055, was strictly limited to copying costs and did not apply to staff time:

Senator Segerblom: [T]hey can charge a reasonable fee of .50 cents. Under extraordinary circumstances, they can charge additional fees.

* * * *

Assemblyman Stewart: I appreciate you bringing this bill in order to save the public money and give them more access. If someone from out of state or out of country requested information, would this preclude the agencies from charging the requester postage.

Senator Segerblom: This is actually a question I never thought of. We do not have anything in the bill regarding postage, so I do not think it would. ***This is basically only the copying charge, so I would assume it would not.***

Id. (emphasis added). Thus, the legislative history distinguishes the .50-cent copy charge from the extraordinary use of personnel or technological resources.

1. **NRS 239.055 Permits an Additional Reasonable Fee that LVMPD Actually Incurs for Extraordinary Use of Personnel and Technological Resources.**

The legislative history, from 2007 through 2013, clearly evidences that LVMPD is permitted to charge for staff time in responding to the records requests, so long as the cost is reasonable and actually incurred by LVMPD. There is no doubt that the thousands of hours in manpower over several months requires LVMPD to utilize extraordinary use of its personnel.

Despite the District Court's finding that it was necessary for LVMPD to employ extraordinary use of personnel in producing the requested records, the District Court limited LVMPD's extraordinary use fee to .50 cents per page. In

addition, LVMPD could charge .31 cents for copies per page, totaling a fee of .81 cents per page. To reach this conclusion, the District Court ignored the “reasonable” and “actually incurred” language of the statute and solely relied on the .50-cent copying limitation.

The Legislative history clarifies that the .50-cent fee limitation strictly applies to copying charges and the purpose of NRS 239.055 was to allow leeway if additional cost was incurred as a result of extraordinary use of personnel. The rationale of the .50-cent limitation was due to inconsistencies across governmental agencies that charged anywhere from \$1-2 per page for copies, including the courts. In essence, the language that “the fee charged by the governmental entity must be reasonable and must be based on the cost that the governmental entity actually incurs” would be rendered superfluous if a governmental agency was only limited to charging a .50-cent fee for the extraordinary use of personnel. In other words, NRS 239.055 limits the NRS 239.052 fee for copying and is separate and apart from the additional fee LVMPD can charge. The Legislative history also supports LVMPD’s position to charge for personnel costs and staff time. As illustrated in the Attorney General Opinion, this is based on the hourly rate of the employee performing the work. Understanding that the subject records were of such large volume and the redactions in this case required specialized personnel,

LVMPD offered to perform the redactions at a rate of \$50.00 an hour, rather than the full rate of the Detectives' salaries.

While LVMPD is responsible for responding to public records requests as a governmental agency, it was certainly not the intent of the NPRA to require LVMPD to displace its entire governmental function in order to respond to records requests, including pulling detectives off the streets to perform document review. In conformity with the legislative history, LVMPD is permitted to charge a reasonable hourly rate of the qualified employee performing the redactions.

2. Nothing within NRS 239.055 Excludes or Prohibits its Application to Electronic Records.

Ignoring the plain language of NRS 239.055, which does not prohibit its application to electronic records and permits an additional fee for technological resources, the District Court erroneously concluded that LVMPD could not assess a fee for redacting BWC footage and 911 calls. Importantly, LVMPD stands by its position that the BWC statute discussed *infra* provides that BWC footage containing confidential information is subject to inspection. However, because the District Court ordered LVMPD to produce the BWC records, LVMPD requests this Court to determine that NRS 239.055 applies to the BWC footage production because it required extraordinary use of personnel and technological resources as a result of the necessary redactions.

Courts should refrain from adding or altering language within a statute to accomplish a purpose not on the face of the statute. *State Indus. Ins. System v. Bokelman*, 113 Nev. 1116, 1122, 946 P.2d 179, 183 (1997). Furthermore, this Court will not construe a statute to produce an unreasonable result when another interpretation will produce a reasonable result. *Breen v. Caesars Palace*, 102 Nev. 79, 82, 715 P.2d 1070, 1072 (1986).

There is simply no language in NRS 239.055, let alone within the NPRA, that specifically addresses electronic records. An interpretation differentiating between records with pages and electronic records would be unreasonable and entirely inconsistent with the NPRA. The NPRA applies to all public records and does not differentiate between electronic and paper records. In reaching its decision that BWC footage and 911 calls were excluded from the extraordinary use provision, the District Court relied on the “per page” language of the statute. Specifically the statute reads, in part:

[I]f a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources, the governmental entity may, in addition to any other fee authorized pursuant to this chapter, charge a fee not to exceed .50 cents per page for such extraordinary use.

...

The fee charged by the governmental entity must be reasonable and must be based on the cost that the governmental entity

actually incurs for the extraordinary use of its personnel or technological resources.

NRS 239.055(1). The District Court ignored the proceeding language that allows LVMPD to charge a fee for extraordinary use so long as it is reasonable and actually incurred. As discussed in detail above, the per page cost limitation strictly applies to copy charges, which is permitted under NRS 239.052. In contrast, the proceeding sentence has no per page language or any other language that excludes electronic records such as BWC footage and 911 calls. Notably, the District Court found that the BWC footage and 911 calls fell under NRS 239.052 and not NRS 239.055. There is no basis for allowing costs for electronic records under NRS 239.052 but prohibiting LVMPD to recover an additional fee pursuant to NRS 239.055 if extraordinary use of personnel is utilized in preparing the same record. As such, NRS 239.055 cannot be interpreted to be limited to records containing pages.

Moreover, NRS 239.055 explicitly addresses the use of technological resources. Technological resources is defined as “any information, information system or information service acquired, developed, operated, maintained or otherwise used by a governmental entity.” NRS 239.055(2). The District Court acknowledged that Respondents’ “requests required technological personnel, equipment and supervisors.” 7 AA 1328. The language “technological resources”

alone insinuates that the Legislature contemplated electronic records, such as BWC footage and 911 calls, to be within the purview of NRS 239.055. For these reasons, the Court should conclude that the BWC footage and 911 calls are not excluded from the extraordinary use statute.

D. THE DISTRICT COURT ERRED BY PERMITTING RESPONDENTS TO PAY THE PRODUCTION COSTS OVER A SIX-MONTH PERIOD RATHER THAN REQUIRING RESPONDENTS TO PAY THE ESTIMATED FEE UPFRONT.

In cases involving extraordinary use of personnel and technological resources, the payment for the records must be paid up front, prior to production. Alternatively, LVMPD asks this Court to determine that a substantial deposit prior to production must be made. Upon receiving a request, but before preparing the requested information, a government entity is required to inform the requester of the amount of the fee when it involves extraordinary use. NRS 239.055(1). Certainly, the purpose behind this provision is to ensure that the government entity is reimbursed for the actual cost it incurred in employing extraordinary use. *See Manuela H. v. Eighth Jud. Dist. Ct.*, 132 Nev. Adv. Op. 1, 365 P.3d 497, 501 (2016) (determining that when a statute does not address the issue at hand, the Court looks to reason and public policy to determine what the Legislature intended).

Without a payment prior to production, or at least a substantial deposit, LVMPD is forced to bear the cost of production, or face litigation, while the requester walks away scot free. On numerous occasions, LVMPD has faced this exact scenario. After LVMPD prepares the responsive records, the requester fails to collect the records. On the other hand, if LVMPD refuses to produce the records until payment is received, the requester may initiate suit claiming that such a requirement effectively denies access to public records. *See* NRS 239.0107.

Moreover, the government entity lacks a remedy for seeking payment. This is especially true if the requester refuses to collect the records. LVMPD has also faced other situations where the requester will modify its request mid-production from seeking copies of records to inspection of records. The only way to ensure that LVMPD, or any other government entity, receives payment for production of records requiring extraordinary use is to mandate that payment or, in the alternative, a substantial deposit be made in advance.

VIII. CONCLUSION

In summary, the Court should require inspection, rather than production, of BWC footage that contains confidential information in relation to public records requests pursuant to NRS 289.830. Additionally, the Court should allow LVMPD to charge a reasonable fee to Respondents for time spent redacting all records, including the BWC footage and 911 calls based upon NRS 239.055. Finally, this

Court should conclude that production of records necessitating extraordinary use of personnel or extraordinary resources requires an advance payment of the estimated fee. Upon these grounds, LVMPD urges this Court for relief.

Dated this 26th day of September, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 9,331 words; or

☐ does not exceed _____ pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26th day of September, 2018.

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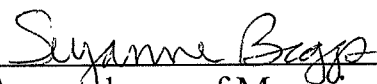
CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT/CROSS-RESPONDENT**
LVMPD'S OPENING BRIEF was filed electronically with the Nevada Supreme Court on the 26th day of September, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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An employee of Marquis Aurbach Coffing